UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WOOFHAUS, INC., et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 00-353-P-H***
	)	
INHABITANTS OF THE TOWN OF	***)***	
OLD ORCHARD BEACH,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, the Town of Old Orchard Beach ("the town"), has moved for summary judgment in this action alleging a constitutional violation under 42 U.S.C. § 1983 by its officers and agents in connection with lodging units owned by the plaintiffs. I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v.*

Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts[1] are appropriately supported in the parties' submissions in connection with the motion for summary judgment.

The plaintiffs are Woofhaus, Inc., a corporation, and its principals, Otok Ben-Hvar, who acts as the corporate clerk, and Robert L. Henderson, M.D., the owner and corporate president. Statement of Material Facts in Support of Defendant's Motion for Summary Judgment ("Defendant's SMF") (Docket No. 7) ¶ 1; Plaintiff's Responsive SMF ¶ 1. The corporation owns two lots in the town

[1] In many instances, the plaintiffs' response to statements included in the defendant's statement of material facts is a bare denial without the citation to the record that is required by this court's Local Rule 56(c). Plaintiffs' Opposing Statement of Material Facts in Opposition to Motion for Summary Judgment ("Plaintiffs' Responsive SMF") (Docket No. 8) ¶¶ 14-17, 32, 38, 45-48, 53-59, 61, 66-68, 70, 85 & 87. Accordingly, to the extent that those statements by the defendant are supported by citations to the summary judgment record as required by the local rule, they are deemed admitted. Local Rule 56(e). For the same reason, I will not consider the plaintiffs' purported qualification of certain statements, when that qualification is unaccompanied by a citation to the summary judgment record. *Id*. ¶¶ 25, 60, 71, 78.

where it pursues the business of motel and cabin rental. *Id*. ¶ 2. The plaintiffs operate a main building and five cottages on the south side of Summit Street, known as the Apple Inn, and fourteen cottages on the north side of Summit Street, known as Tiffany Village. Plaintiffs' Separate Statement of Material Facts[2] ("Plaintiffs' SMF") (Docket No. 10) ¶¶ 2-3; [Response to] Plaintiffs' Separate Statement of Material Facts ("Defendant's Responsive SMF"), included in Defendant's Reply to Plaintiffs' Statement Regarding Material Facts (Docket No. 12), ¶¶ 2-3. The town has a town meeting/town council form of government and is a resort town dominated by seasonal businesses. Defendant's SMF ¶ 4; Plaintiffs' Responsive SMF ¶ 4. James H. Nagle is the code enforcement officer for the town; Craig A. Collins is a firefighter for the town. *Id*. ¶¶ 5-6.

The town licenses a variety of businesses, including seasonal and year-round lodging. *Id*. ¶ 10. Licenses for lodging activities are renewable by the town clerk "upon receipt of the required fee and of a written statement from the license [sic] that there has been no material change in information provided in the licensee's previous application." *Id*. ¶ 11. The annual licensing cycle begins May 1 and ends April 30. *Id*. ¶ 12. The town clerk must refer a license renewal request to the town council if "the Clerk has received during the past twelve months, any written complaint from any persons charging that the license [sic] has violated the terms of this or any other Town Ordinance." *Id*. ¶ 13. Under the town licensing ordinance, the plaintiffs' property was licensed as seasonal rental units. Deposition of James H. Nagle ("Nagle Dep."), attached as Exh. A to Defendant's SMF, at 15-16. The definition of "seasonal" in the town ordinance permits operation between Memorial Day and Columbus Day, notwithstanding the fact that all licenses are for a period

[2] Counsel for the plaintiffs is reminded that the citation "Affidavit of Jodine Adams" in support of a numbered paragraph in a statement of material facts, Plaintiffs' SMF ¶¶ 8 & 9, without any further citation to a specific paragraph of that affidavit, is insufficient under this court's Local Rule 56.

of one year from May 1 through April 30. *Id*. at 10, 15-16. The Apple Inn also had a license issued by the Maine Department of Human Services for a lodging place of four rooms for the period from December 1, 1997 to June 30, 1998. Plaintiff's Exh. 10A, attached to Defendant's SMF.

Under the town's license ordinance, "any person who operates or conducts any business or activity for which a license is required [under the Licensing] Ordinance without first obtaining such license commits a civil violation and shall be subject to a fine not to exceed One Hundred ($100) Dollars." Defendant's SMF ¶ 18; Plaintiffs' Responsive SMF ¶ 18. Under this ordinance, any licensee who permits a business or activity to occur that involves an act, omission or condition that is contrary to the health, morale, safety or welfare of the pubic or forbidden by any state law or town ordinance applicable to the operation for which the license was granted commits a civil violation. *Id.* ¶ 19. The ordinance also provides that "[l]icenses may be temporarily suspended without prior notice and hearing if in the judgment of the Building Inspector, the Town Manager or the Town Council the continued operation of the licensed business or activity constitutes an immediate and substantial threat to the public health and safety provided the licensee receives written notification of the suspension and the reason therefore, prior to its taking effect and a hearing is scheduled as soon as possible thereafter." *Id*. ¶ 20.

The town has a housing code ordinance which establishes minimum standards for the condition and maintenance of dwellings offered for rent and the "supplied utilities and facilities and other physical things and conditions essential to making dwellings safe, sanitary and fit for human habitation." *Id*. ¶ 21. The housing code is administered by the code enforcement officer. *Id*. ¶ 22. The housing code ordinance authorizes the code enforcement officer to "investigate complaints of alleged housing violations" and to conduct inspections of all premises within the scope of the ordinance. *Id*. ¶ 23. The ordinance authorizes the code enforcement officer to enter rented premises at

reasonable hours, upon giving proper identification, to inspect the premises in order to determine compliance with the provisions of the ordinance. *Id*. ¶ 24.

On February 18, 1998 Jodine Adams, an assistant in the town's code enforcement office, received a complaint about the Apple Inn from Andy Ledger, who lived in one of the nine units in the main building of the Apple Inn. *Id*. ¶¶ 26-27. Ledger said that the plumbing was not working; some tenants had no plumbing; tenants had to do their own electrical and plumbing work; and tenants had to work on the boiler to keep it running. *Id.* ¶ 29. He told Adams and Nagle that he had been living in the property for approximately one year and provided receipts showing that he had paid rent from August 8, 1997 through at least February 26, 1998. *Id*. ¶¶ 30-31. Nagle asked Ledger if he would permit Nagle to inspect his room and Ledger declined. *Id*. ¶ 33.

Nagle's standard procedure for investigating tenant complaints about habitability is to listen to the complaint, talk with the owner and determine whether the complaint is legitimate and, if so, obtain a corrective action plan from the landlord. *Id*. ¶ 34. Between February 18 and April 23, 1998 Nagle contacted a woman who lived across the street from the Apple Inn, who advised him that plaintiff Otok Ben-Hvar, also known as Ben Garcia, would be in touch with him. *Id*. ¶¶ 1, 36. Because Ledger had mentioned that there were other people living in the Apple Inn, Adams attempted between February 18 and April 23 to contact people living on the plaintiffs' property, without success. *Id*. ¶ 37.

On April 23, 1998 Ledger returned to the town's code enforcement office complaining of habitability issues, including the fact that his toilet had fallen through the floor of his apartment. *Id*. ¶ 39. Ledger agreed to allow Nagle to inspect his apartment. *Id*. ¶ 41. The following town employees joined Nagle at Ledger's apartment at 1:00 p.m. that day: Reny Remillard, the electrical inspector; Adams; and Collins. *Id*. ¶¶ 42-43. These employees entered Ledger's room and observed that the toilet had fallen through the floor. *Id*. ¶ 44. Other tenants present at the time insisted that the officials

view their apartments. Nagle Dep. at 47. The temporary manager of the property, Ralph Penna, was told what the town's employees were doing and consented to a further search of the property. Defendant's SMF ¶ 52; Plaintiffs' Responsive SMF ¶ 52. Penna told the town's employees that he would just as soon have the tenants leave because they had stopped paying rent. *Id*. ¶ 50. Prior to April 23, 1998 Woofhaus had instituted eviction proceedings in district court against most of the tenants. *Id*. ¶ 51. The tenants left the building voluntarily; they were not ordered to leave. Nagle Dep. at 49, 52.

By letter dated April 23, 1998 the town assessor notified Woofhaus that it was in violation of the license ordinance with respect to Tiffany Village. Defendant's SMF ¶ 60; Plaintiffs' Responsive SMF ¶ 60 & Defendant's Exh. 18, attached to Defendant's SMF. Under the terms of the ordinance Woofhaus was required to go before the town clerk for a hearing on its license renewal in view of the complaint and inspection on April 23. Defendant's SMF ¶ 62; Plaintiffs' Responsive SMF ¶ 62. On his return to Maine in May 1998, plaintiff Ben-Hvar thanked Nagle for accomplishing what he believed was the eviction of his tenants. *Id*. ¶ 63.

On June 2, 1998 the plaintiffs' property was subject to a more formal inspection with representatives of the plaintiffs, Collins and Remillard, the electrical and plumbing inspector, present. *Id*. ¶ 64. Because the buildings were in bad shape, with violations too numerous to mention, a design professional was suggested to remedy the defects. *Id*. By letter dated July 9, 1998 an attorney requested that the town clerk put the matter on the next available agenda before the town council "with regard to Tiffany Village's licensing and alleged code violations." *Id*. ¶ 69. By letter dated July 13, 1998 the town clerk submitted this request to the town council along with the complaint which prohibited automatic relicensing. *Id*. ¶ 71. The town council met on July 21, 1998 but the matter of

the Woofhaus license had not been placed on the agenda because the clerk's July 13 letter was not transmitted to the town manager's office. *Id*. ¶ 72.

The matter was placed on the agenda for a special meeting of the town council on July 28, 1998. *Id*. ¶ 73. At that meeting Woofhaus appeared through its attorney and represented that licensed master technicians would perform the work necessary to bring the buildings up to standards. *Id*. ¶ 74. On July 28, 1998 the town council approved the license for Tiffany Village based on representations by the attorney that work necessary to bring those cabins up to code standards had been completed. *Id.* ¶ 75. However, the town council declined to issue a license for the Apple Inn and rescheduled the matter for its August 4, 1998 meeting. *Id*. ¶ 76. By letter dated July 28, 1998 the attorney for Woofhaus agreed to have "a master plumber, master electrician and boiler person come in to 'sign off' on Tiffany Village and acknowledge the fact that it is up to code or is as close to code as possible so that it can be properly licensed." *Id*. ¶ 77. No licensed master technicians performed any work necessary to meet code requirements in the main building of the Apple Inn. *Id*. ¶ 78.

On August 4, 1998 the town council considered the license for the Apple Inn. *Id*. ¶ 79. The attorney for Woofhaus represented that a master engineer, Mr. Chittim, had been through the Apple Inn and that the problems with its five cabins were "mostly esthetic." *Id*. He represented that Nagle "has no problems with the five cabins although there are real problems with the Motel and the nine units." *Id*. ¶ 80. The town council tabled action on the license with the understanding that Nagle could authorize a license for the five cabins at the Apple Inn once the necessary work was completed. *Id*. ¶ 81. On August 13, 1998 the town council again tabled action on the license for the Apple Inn. *Id*. ¶ 83. Chittim prepared a draft report dated August 15, 1998 which summarized his July 31 and August 4 inspection of the subject property. *Id*. ¶ 82. It included the statement that "the extent of corrective actions necessary to bring the main building and cabins into conformity may be sufficiently costly that

the financially prudent course may be to raze them and construct new facilities." *Id*. Chittim submitted a revised report by letter dated September 11, 1998 which he stated "differs from the preliminary report only in those areas which suggested that razing the main building might be an attractive option. My original language has been subdued at your request." *Id.* ¶ 84. This report included a long list of code violations found at the main building of the Apple Inn. *Id*. ¶ 86.

III. Discussion

The complaint alleges that the town deprived the plaintiffs "of their constitutional rights by entering the premises of Woofhaus, Inc., evicting all of Plaintiffs' customers and 'shutting the business down.'" Complaint (attached to Notice of Removal Pursuant to Federal Rules of Civil Procedure 81(C) and 28 U.S.D.A. [sic] Section 1332, 1441, 1446 (Docket No. 1)) ¶ 9. It also alleges that the town deprived them "of a property interest in the use and enjoyment of its [sic] cabins without due process," *id*. ¶ 16, and that the town violated their "property rights under the Just Compensation Clause of the Fifth Amendment of the United States Constitution," *id*. ¶ 17. The complaint alleges that the plaintiffs are entitled to damages pursuant to 42 U.S.C. § 1983. *Id*. ¶ 16.

The defendant, understandably unsure about the exact constitutional basis for the plaintiffs' claims, includes in its motion for summary judgment discussion of municipal liability under section 1983 and four possible sources of the plaintiffs' constitutional claims: the Fourth Amendment, procedural due process, substantive due process, and the takings clause. Defendant's Motion for Summary Judgment, etc. ("Motion") (Docket No. 6) at 6-20. The plaintiffs' objection to the motion, construed indulgently, deals only with municipal liability and procedural due process. Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, etc. ("Plaintiffs' Opposition") (Docket No. 9) at 4-8. Counsel for the plaintiffs stipulated at the final pretrial conference held in this case that the plaintiffs are not pursuing separate claims based on an alleged constitutional violation other than

procedural due process. Report of Final Pretrial Conference and Order (Docket No. 15) at 2. Accordingly, the Fourth Amendment, substantive due process, and the takings clause will not be considered further.

A. Municipal Liability

The defendant contends that the plaintiffs cannot establish that any municipal policy or custom caused the alleged deprivation of constitutional rights, as required by *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978), when a claim is brought under 42 U.S.C. § 1983 against a municipality. Motion at 7-9.

> Something more than liability on the part of [the municipal employees or agents of the municipality] must be shown to impose liability on the municipality. A plaintiff seeking damages against the municipality must show that the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the municipality's officers or is pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Fletcher v. Town of Clinton, 196 F.3d 41, 55 (1st Cir. 1999) (citation and internal punctuation omitted).

> A municipality may be held liable for acts taken pursuant to a "policy" by at least two methods: when the deprivation resulted (1) from the decisions of its duly constituted legislative body, or (2) from the decisions of those officials whose acts may fairly be said to be those of the municipality. In such cases, municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.

Silva v. Worden, 130 F.3d 26, 31 (1st Cir. 1997) (citations and internal punctuation omitted). The plaintiffs identify no decision of the town's "duly constituted legislative body" that might be applicable to their claim, nor do they attempt to identify a decisionmaker within the scope of the *Silva* definition who had final authority to establish a policy of the town that authorized the actions at issue.

Accordingly, the plaintiffs cannot proceed under the "policy" prong of the *Monell* standard for section 1983 actions against municipalities.

> [C]ourts have established two requirements for plaintiffs to meet in maintaining a § 1983 action grounded upon an unconstitutional municipal custom. First, the custom or practice must be attributable to the municipality. In other words, it must be so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind the deprivation of constitutional rights.

Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted); *see also Miller v. Kennebec County*, 219 F.3d 8, 12 (1st Cir. 2000). The plaintiffs have made no attempt to show that officials or employees of the defendant engaged in a practice of depriving operators of lodging establishments of their licenses without due process of law, whether under circumstances similar to those presented in this case or under any other circumstances, let alone that such a practice was well-settled and widespread. In the absence of such evidence, the defendant is entitled to summary judgment.

B. Procedural Due Process

Although it is not necessary to consider the specific constitutional violations alleged by the plaintiffs given their failure to present evidence to meet the requirements of *Monell*, I will do so here so that the court may have the benefit of my analysis should it disagree with my recommendation on that threshold issue.

The defendant contends that the plaintiffs do not have the necessary protected property interest in order to invoke constitutional due process protections and that, even if such an interest existed, it provided the plaintiffs will all of the process that was due under the circumstances. Motion at 12-15. The plaintiffs respond that they did have a property interest in the municipal license, because they had held valid licenses over a period of nine years, they held a license valid until a week after the

defendant's employees visited the Apple Inn, and the license did not state on its face that it was only for seasonal occupation. Plaintiffs' Opposition at 4-5.

> The Due Process Clause also encompasses . . . a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies *is* relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (emphasis in original; citations omitted). "[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (noting that negligent deprivations of property do not violate the clause when predeprivation process is impracticable). Courts "assess the adequacy of procedures by balancing the government's interest against the private interest affected by the action, the risk of an erroneous deprivation, and the value of additional safeguards." *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994).

> In order to establish a procedural due process claim under § 1983, [a plaintiff] must allege first that it has a property interest as defined by state law and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process.

PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 30 (1st Cir. 1991). Here, the plaintiffs' claim founders on the first requirement. Under Maine law, they do not have a property interest in the license at issue.

> Generally, licenses do not create a protected property interest when broad discretion is vested in a state official or agency to deny or approve the application. In such cases, an applicant has little more than an abstract or unilateral expectation in that license. On the other hand, if a benefit is a matter of statutory entitlement for persons qualified to received them, then the government has created a property interest in that benefit.

Munjoy Sporting & Athletic Club v. Dow, 755 A.2d 531, 537 (Me. 2000) (citations and internal punctuation omitted). Neither the fact that the plaintiffs had held annual seasonal licenses for a period of nine years nor the fact that the annual period for the current license had not expired at the time of the inspection nor the words on the face of the license establish an entitlement to a renewal of that license as a matter of law, and it is significant that the plaintiffs point to no source of such an entitlement in state statute or any town ordinance. The plaintiffs make no attempt to demonstrate that the applicable town ordinances do not vest broad discretion in the town council to deny or approve applications for seasonal lodging licenses.

Even if the plaintiffs had established a colorable claim to a protected property right in a renewal of their license, however, their argument that a predeprivation hearing was constitutionally required could not succeed. Where human health and safety is at issue, which is the very nature of the concept of habitability, predeprivation notice and hearing simply is not practicable. Here, the town ordinance provided for a postdeprivation hearing "as soon as possible." That is all that is constitutionally required. *See Herwins v. City of Revere*, 163 F.3d 15, 17-20 (1st Cir. 1998) (city officials issued order to owner and tenants to vacate building forthwith due to finding on inspection that building was unfit for human habitation; owner alleged procedural due process violation due to lack of notice and hearing prior to closure of building; court held availability of postdeprivation

remedy sufficient even where official errs in declaring emergency). The plaintiffs contend that the defendant was dilatory in providing the postdeprivation hearing in this case, causing them damage. "[E]xtraordinarily long delays may render a postdeprivation remedy inadequate" for purpose of due process analysis. *Cronin v. Town of Amesbury*, 81 F.3d 257, 260 (1st Cir. 1996). However, for all that appears in the summary judgment record, the only delay in scheduling a hearing before the town council after the plaintiffs requested it was one week, resulting in a hearing on July 28, 1998 rather than July 21, 1998. After the hearing, a license was issued for Tiffany Village. A license was not issued at that time for the Apple Inn, and at the August 4, 1998 meeting of the town council the attorney for the plaintiffs acknowledged that the code enforcement officer had "real problems with the Motel and the nine units." Defendant's SMF ¶ 80; Plaintiffs' Responsive SMF ¶ 80. There is no evidence in the summary judgment record that the plaintiffs took any action thereafter to address those concerns. Accordingly, there is no evidence of a delay sufficient to render the postdeprivation remedy offered by the defendant constitutionally inadequate in this case.

The defendant is entitled to summary judgment on the merits of the plaintiffs' procedural due process claim.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 11th day of May, 2001.

David M. Cohen
United States Magistrate Judge

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